INTERIOR BOARD OF INDIAN APPEALS

Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts
v. Portland Area Director, Bureau of Indian Affairs

22 IBIA 22 (04/13/1992)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

JOINT BOARD OF CONTROL FOR THE FLATHEAD, MISSION AND JOCKO IRRIGATION DISTRICTS
v.
ACTING PORTLAND AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 91-34-A Decided April 13, 1992

Appeal from a decision concerning the 1990 Flathead Agency Operating Procedures for Irrigation and Fisheries.

Affirmed.

1. Appeals: Generally--Indians: Generally

The Board of Indian Appeals is not required to consider issues and arguments that are raised for the first time on appeal.

APPEARANCES: Jon Metropoulos, Esq., Helena, Montana, for appellant; Vernon Peterson, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Portland, Oregon, for the Area Director; Patrick L. Smith, Esq., Tribal Legal Department, Pablo, Montana, for the Confederated Salish and Kootenai Tribes.

OPINION BY CHIEF ADMINISTRATIVE JUDGE LYNN

Appellant Joint Board of Control for the Flathead, Mission, and Jocko Irrigation Districts seeks review of a November 26, 1990, decision of the Acting Portland Area Director, Bureau of Indian Affairs (BIA; Area Director), concerning the 1990 Flathead Agency Operating Procedures for Irrigation and Fisheries (operating procedures). Appellant's appeal is opposed by the Confederated Salish and Kootenai Tribes (Tribes). For the reasons discussed below, the Board of Indian Appeals (Board) affirms that decision.

Background

These parties have previously been before the Board on several occasions. Most recently, the Board considered the 1989 operating procedures. See 19 IBIA 31 (1990). The general background of this controversy is set forth in the Board's previous decision, and will not be repeated here. See also Joint Board of Control of the Flathead, Mission & Jocko Irrigation Districts v. United States, 862 F.2d 195 (9th Cir. 1988) (JBC II); Joint Board of Control of the Flathead, Mission & Jocko Irrigation Districts v. United States, 832 F.2d 1127 (9th Cir. 1987), cert. denied, 486 U.S. 1007 (1988) (JBC I); Confederated Salish & Kootenai Tribes of the Flathead Reservation v. Flathead Irrigation & Power Project, 616 F. Supp. 1292 (D. Mont. 1985).

The 1990 operating procedures were to be in effect from April 15, 1990, through April 15, 1991. 1/ Draft operating procedures were presented by the Superintendent on February 9, 1990. The cover letter stated, inter alia:

> The 1990 draft plan is based on the 1989 plan and reflects minimal change. This is due to the following two factors:
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> 1. The 1989 operations were for the most part carried out without substantial problems.
>
> 2. The "1989 Plan" is currently under appeal by [appellant] before the Department of the Interior, Office of Hearings and Appeals, Interior Board of Indian Appeals.
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> The fact that the "1989 Plan" is currently under appeal is particular justification for minimizing change in the 1990 Plan since no final ruling has been rendered on the issues raised.

Comments on the proposed 1990 operating procedures were solicited. Appellant submitted comments.

The Superintendent issued the final operating procedures on May 3, 1990. There were only minimal changes from the draft. In accordance with instructions presented in the cover letter to the final operating procedures, appellant filed a notice of appeal under 25 CFR Part 2. The Tribes filed an answer brief in that appeal.

The Board's decision concerning the 1989 operating procedures was issued on October 23, 1990. By letter dated November 26, 1990, the Area Director issued the decision under appeal. The Area Director dismissed appellant's appeal on the grounds that appellant challenged the instream flow provisions and raised issues identical or similar to issues previously addressed by the Area Director or the Board. He concluded: "Your present appeal does not raise any issue or cite any new evidence which would warrant or justify reexamining the determinations made in the 1989 appeal" (Letter at 3).

The Board received appellant's notice of appeal from this decision on December 31, 1990. Briefs were filed on appeal by appellant, the Area Director, and the Tribes.

Discussion and Conclusions

Appellant contends that in establishing the operating procedures, BIA engaged in rulemaking in violation of the Administrative Procedure Act

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1/ On Mar. 15, 1991, the Flathead Agency Superintendent, BIA (Superintendent), notified interested persons that he was extending the effective date of the 1990 operating procedures through Apr. 14, 1992. Appeal rights were set forth in the Superintendent's letter. The Board does not know if any appeals were filed based upon this extension.

(APA), 5 U.S.C. §§ 551, 553 (1988). 2/ Specifically, appellant asserts that BIA failed to publish the operating procedures, which appellant terms "final agency rules," 30 days prior to their implementation, thus violating appellant's due process right to contest the operating procedures; and alleges that the operating procedures were developed with close consultation with the Tribes, in violation of appellant's equal protection right to objective rulemaking. 3/

Appellant's argument that the operating procedures are established through a rulemaking proceeding may have been prompted by the first part of footnote 7 of the Board's decision regarding the 1989 operating procedures, which states:

> While the establishment of operation and maintenance rates has been recognized as rulemaking, the adoption of operating procedures has followed a hybrid route, encompassing characteristics of both rulemaking and adjudicatory procedures. No party has raised the question of whether the 1989 Operating Procedures are a "rule" within the meaning of the Administrative Procedure Act, 5 U.S.C. § 551(4).

The Board continued in the same footnote, however:

> The Federal courts which have issued decisions in this matter have treated the adoption of operating procedures as adjudicatory rather than rulemaking actions. See JBC II, 862 F.2d at 199-200. The Board finds that the Ninth Circuit's analysis in JBC II is binding in this case.
>
> In any event, appellant clearly had actual and timely notice of the action. See 5 U.S.C. § 552(a): "Except to the extent that a person has actual and timely notice of the terms thereof,

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2/ All further citations to the United States Code are to the 1988 edition.

3/ Appellant comments that "[t]he administrative procedure for appealing decisions of BIA officers within the Bureau and the Department of the Interior is identical for rulemaking and other decisions" (Opening Brief at 7). This statement is incorrect. In Joint Board of Control for the Flathead, Mission & Jocko Irrigation Districts v. Portland Area Director, 17 IBIA 65 (1989), the Board discussed the setting of operation and maintenance rates for the Flathead Irrigation District. The Board held that this action constituted "rate-setting," which is a "rule" within the meaning of 5 U.S.C. § 551(4) and (5). The Board noted at 17 IBIA 70 that "it does not have authority to change or declare invalid duly promulgated Departmental regulations." The Board further noted that it would normally dismiss an appeal from a rulemaking proceeding for lack of jurisdiction. Obviously, if the Board does not have authority to review rulemaking, but does have authority under 25 CFR Part 2 and 43 CFR Part 4, Subpart D, to review decisions of BIA officials, the administrative procedure for appealing these two types of actions is not identical within the Department.

> a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."

(19 IBIA at 38).

It has thus been determined that the operating procedures are adopted through an adjudicatory proceeding, rather than through rulemaking. Appellant's contention that BIA violated the APA by not publishing the operating procedures in accordance with the rulemaking provisions of the APA is rejected.

The fact that the operating procedures are not established through a rulemaking proceeding does not violate appellant's due process rights to contest the procedures. As the court noted in JBC II, 862 F.2d at 199-200, appellant has the right to contest the establishment of the operating procedures through the administrative adjudicatory provisions in 25 CFR Part 2 and 43 CFR Part 4, Subpart D. Recognizing the short duration of each year's operating procedures, both the Board and the courts have considered appellant's challenges to those procedures under the exception to the mootness doctrine for short-term actions, "capable of repetition, yet evading review" (JBC I, 832 F.2d 1130, quoting Southern Pacific Terminal Co. v. ICC, 219 U.S. 498 (1911)). Appellant has an opportunity to contest the operating procedures.

Appellant also argues that the operating procedures violate the APA because they are established through improper ex parte communication between the Tribes and BIA. Appellant has presented only speculation in support of this argument. This speculation is directly contradicted by the Tribes. The Board finds that appellant has not shown that BIA had improper ex parte contacts with the Tribes in establishing the operating procedures. 4/

Appellant contends that in setting the operating procedures, BIA violated congressional directives to consult with appellant. Appellant does not cite any congressional directives mandating such consultation. Accordingly, appellant has not shown any BIA error. It is possible that this

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4/ It is also possible that with this argument appellant is repeating its argument, previously raised to the courts and the Board, that BIA sets the instream flow levels through improper ex parte communication with the Tribes. This argument was specifically rejected in JBC I, 832 F.2d at 1132:

"While [appellant] and junior appropriators are free to contest by legal mans the Tribes' and the BIA's quantification of the Tribes' fishing water rights, [appellant] has produced, and we find, no authority that guarantees it a right to participate in the process by which the BIA and the Tribes initially establish that quantification."

To the extent that appellant's argument raises the issue of communication between BIA and the Tribes concerning the initial quantification of the instream flow levels necessary to protect the treaty fishing right, that issue has been decided against appellant and is res judicata.

argument is a variation of appellant's APA argument. As such, it has been considered and rejected supra.

Appellant argues that BIA unreasonably set levels for instream flows at a constant high level. In JBC I, the court recognized appellant's right to contest the instream flow levels through legal means. See footnote 4, supra. Therefore, the Board considers that this challenge, although also raised in previous appeals, is properly raised again.

However, appellant's argument concerning instream flow levels merely repeats, in a very general and short narrative, its conclusions that the levels are too high. Appellant presents no justification or support for its conclusions. Because appellant presents no new information or arguments that would cause the Board to question the instream flow levels, it has not shown error in their establishment. Cf. 19 IBIA at 36-37.

Appellant contends that "the use of interim operating procedures aimed at preserving fisheries and fish habitat in artificially created water ways is unreasonable, arbitrary, capricious, and contrary to law as it violates the statutes creating the irrigation works and lacks support in the 1855 Treaty of Hellgate" (Opening Brief at 5). Appellant explains this argument:

> The artificial water courses including reservoirs cannot form a part of any aboriginal fishery rights the Tribes may have. The clearest example of this concerns the requirement of minimum pool level in reservoirs to preserve fisheries and fishery habitat where none existed prior to the creation of the reservoir. [BIA] has provided no reasonable explanation for this decision and indeed none exists. If the Tribes have an aboriginal fisheries right, such right certainly cannot apply to fisheries and fish habitat created by the actions of man after the creation of the reservation. [Emphasis in original.]

(Opening Brief at 9-10).

In its reply brief, appellant backs away somewhat from its apparent position that there can be no treaty fishery in an "artificial" water system. Appellant states that

> the only real issue is whether the "natural" habitat and fishery can be identified and the Project managed in such a way to preserve it in some adequate state until the Tribes' claim is either accepted or rejected. Both the BIA and the Tribes claim the "hydrologic regime and geomorphology" within the area has [sic] been too altered to do this.

(Reply Brief at 18).

Appellant cites no support for its position that there can be no treaty fishery in an artificial water system. Although it is true that the Tribes'

specific treaty fishing right has not been quantified, the fact that the area has been altered by man's intrusion does not mean that the treaty right has been destroyed. See, e.g., Kittitas Reclamation District v. Sunnyside Valley Irrigation District, 763 F.2d 1032 (9th Cir.), cert. denied, 474 U.S. 1032 (1985), which recognized that treaty fishing rights survived the introduction of artificial irrigation systems into previously uncontrolled waterways. BIA has a trust responsibility to protect the treaty fishery, regardless of the impact man has had on the system.

Another aspect of appellant's argument with regard to the artificial nature of the current hydrologic system relates to an alleged violation of the statutes creating the irrigation works. This same issue has been previously addressed by both the Board and the Ninth Circuit. It has been determined that the Tribes' treaty fishery right is senior to the irrigation rights created under the statutes establishing the irrigation system. See JBC I, 832 F.2d at 1131: "This priority date of time immemorial [for the treaty-reserved water right for fishery purposes] obviously predates all competing rights asserted by [appellant] for irrigators." This conclusion will not be disturbed.

Appellant argues that BIA violated the National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321-4335, by not preparing an environmental impact statement (EIS) in connection with the establishment of the operating procedures. In its opening brief, appellant contends that although the Superintendent stated in 1987 that an EIS should be completed, none has been done. Appellant argues:

> NEPA requires compliance when there is any major federal action which may significantly affect the quality of the human environment. See 42 U.S.C. § 4332(2)(C). Additionally, the NEPA, at 42 U.S.C. 4332[(2)](E) imposes a completely separate duty on an agency to "study, develop, and describe appropriate alternatives" when a proposed action "involves unresolved conflicts concerning alternative uses of available resources."
>
> As the BIA originally determined, its implementation of minimum instream flows requires compliance with NEPA. [BIA] has neglected or ignored this recognized duty for over four years, without any justification, epitomizing arbitrary and capricious agency action.

(Opening Brief at 6-7).

Appellant originally sought remand of the NEPA issue to the Area Director on the grounds that the Area Director had neglected to address this issue. However, with its reply brief, appellant filed a motion to amend its notice of appeal by requesting the Board to order the Area Director to comply with NEPA. Appellant states that this change was necessitated by the Area Director's first indication, in his answer brief to the Board, that he did not intend to prepare an EIS. Appellant devotes most of its reply brief to arguments concerning the application of NEPA to this matter.

Both the Tribes and BIA filed motions to strike appellant's reply brief on the grounds that appellant had notice of BIA's position that an EIS was not required, and did not present this argument to the Area Director or to the Board in a timely fashion, instead reserving its case-in-chief to be presented in a reply brief. The Tribes and BIA object to appellant's violation of the rules regarding administrative practice. In the alternative, the Tribes and BIA request an opportunity to respond to the arguments appellant presented in its reply brief.

The Board has determined that additional briefing on the issue of NEPA compliance is not required. Therefore, the motions filed by the Tribes and BIA to respond to appellant's new arguments presented in its reply brief are denied. Furthermore, based upon the following discussion, the Board finds it unnecessary to strike appellant's reply brief. The motions to do so are also denied.

Contrary to appellant's contention in its reply brief, it was or should have been aware of BIA's position that no EIS was required for the establishment of operating procedures. The February 9, 1990, cover letter to the draft operating procedures states at page 2:

> Since minimal changes to the 1989 Plan are being proposed at this time relative to the 1990 Plan, we do not anticipate need for action pursuant to the National Environmental Policy Act. Should input during the public review process indicate the need for substantive change between the 1989 and 1990 plans, the need for NEPA compliance will receive further consideration at that time.

Appellant objected to this statement in its comments on the proposed 1990 operating procedures and in its appeal to the Area Director. In its opening brief, appellant acknowledged this statement and the fact that no EIS was prepared.

[1] The Board is not required to consider issues and arguments that are raised for the first time on appeal. See, e.g., Begay v. Acting Phoenix Area Director, 20 IBIA 248 (1991); Kombol v. Acting Assistant Portland Area Director (Economic Development), 19 IBIA 123 (1990). Most of appellant's NEPA argument was not presented until its reply brief on appeal. Appellant was required to present its arguments fully to the Superintendent and the Area Director during the course of this administrative proceeding. Based upon the evidence in the administrative record, the Board finds that appellant was or should have been aware of BIA's position that no EIS needed to be prepared for the establishment of operating procedures. Therefore, the only NEPA issue properly before the Board is the one raised by appellant in its opening brief, i.e., whether BIA was bound by the Superintendent's 1987 recommendation to prepare an EIS for the operating procedures.

The document upon which appellant relies is an April 3, 1987, environmental assessment (EA) prepared pursuant to NEPA. The "Recommendation and Summary" section of that EA states:

> The [BIA], Flathead Agency, has recommended that an [EIS] be prepared in conjunction with the development of a comprehensive Flathead Agency water management plan. The determination of need for an EIS was made after review of an [EA] prepared by the Flathead Agency. Extensive public input was received at hearings and in written communications during the month of February 1987, that indicated that operation of the Agency Irrigation system has a significant impact on the reservation fishery resource, the agricultural economy of the reservation, and the recreational opportunities provided on the reservation.
>
> The BIA has concluded that full consideration of all relevant factors is required, including: implementation of instream flows and reservoir pool levels sufficient to maintain the [Tribes'] treaty-reserved fishery at productive levels; the development of operational and procedural guidelines to assure efficient delivery of available irrigation water; and the identification of long-term measures required for improved management of the Irrigation system, including the development and implementation of water conservation measures and the repair and rehabilitation of the water storage and delivery system facilities. Such planning will require, as a first step, a thorough assessment of the physical condition and capability and limits of the irrigation system, and an economic feasibility analysis of agricultural production on lands served by the system.

The Superintendent recognized, however, that BIA had an obligation under then-existing court orders to maintain the tribal fishery. He noted that "the purpose in preparing an EIS would be to assure that development of a long-term comprehensive management plan is accomplished with full knowledge of the environmental impacts and the costs and benefits of the project, consistent with the respective rights of all interested parties."

Appellant argues that BIA recognized that an EIS was required for an "interim" water management plan. In essence, appellant's argument is that the yearly operating procedures are, in themselves, a "major Federal action[] significantly affecting the quality of the human environment." 42 U. S. C. § 4332(2)(C).

BIA and the Tribes contend that the Superintendent's recommendation for an EIS was based upon the assumption that BIA would develop a comprehensive management plan for the irrigation project, including rehabilitation of the structural and operational defects in the system. They allege that because of budgetary constraints, such comprehensive analysis and planning have been impossible. 5/ BIA argues:

5/ See, e.g., Feb. 8, 1988, memorandum from the Area Director to the Superintendent:

"The direction provided by the Department of the Interior, Washington D.C. staff was that there would be no funding for comprehensive

> In JBC v. U.S., No. CV 87-107-M CCL, [(D. Mont. July 21, 1987), appellant] challenged the 1987 interim plan, inter alia, on the ground that [BIA] did not comply with NEPA. The United States argued that the EIS was intended for the comprehensive permanent plan and not an interim plan. In its unpublished order dismissing [appellant's] action for failure to exhaust administrative remedies, the court noted that "the BIA did not violate NEPA by implementing an interim plan pending the outcome of the EIS." See July 21, 1987 order, p. 5 * * *. [BIA] will conduct environmental planning as necessary for purposes of specific projects to repair or improve the irrigation system. * * * However, given the mandatory nature of [BIA's] obligation to protect the fishery, and the history of litigation concerning maintenance of instream flows, [BIA's] decision not to prepare an EIS for instream flows is reasonable under the circumstances and should be sustained by this Board.

(Answer Brief at 18). In JBC v. United States, the court stated appellant's NEPA claim to be "that the BIA arbitrarily and capriciously adopted the 1987 Operating Procedures without completing the [EIS] it had determined was necessary" (Order at 2). This is the same argument appellant raises in the present appeal.

Appellant disagrees with BIA's interpretation of the court's unpublished order in JBC v. United States and with BIA's contention that an EIS was recommended only in conjunction with the development of a comprehensive management plan.

The Board rejects appellant's contention that the Superintendent's recommendation applied to interim water management plans, and concludes that the recommendation envisioned the preparation of an EIS for a comprehensive management plan, to include extensive rehabilitation of existing facilities. Appellant's generalized arguments presented both to the Area Director and to the Board in appellant's opening brief do not provide grounds for concluding that BIA violated NEPA by determining that the yearly operating procedures did not require the preparation of an EIS. 6/

Appellant's argument based upon 42 U.S.C. § 4332(2)(E) is also raised for the first time on appeal. Accordingly, the Board does not consider

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fn. 5 (continued)
rehabilitation and betterment of the Irrigation Division's storage and delivery systems. Consequently, it was also the position of the Department that there is no need to do and no funding available for an EIS and the economic studies that would be associated with planning for future management of the Irrigation Division. As a result of this guidance I cannot concur with your findings and recommendation as to the need for the development of an EIS and the associated studies at this time."

6/ The Board expects that BIA will continue to be cognizant of its obligations under NEPA and will undertake any studies that are determined necessary under NEPA.

it. The Board notes, however, that this appears to be another variation of appellant's recurring argument that it is in competition with the Tribes for the same water. To the extent that this is the basis for appellant's argument, the Board repeats that the Tribes' treaty fishing water right has been determined to be senior to the water rights created by the establishment of the irrigation system. 7/

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the November 26, 1990, decision of the Acting Portland Area Director is affirmed.

//original signed
Kathryn A. Lynn
Chief Administrative Judge

I concur:

//original signed
Anita Vogt
Administrative Judge

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7/ Although appellant states, in several different ways, that BIA does not consider its arguments, throughout the history of this controversy appellant has been less than candid and forthcoming in presenting its arguments and supporting evidence during administrative proceedings. BIA and the Board might be more receptive to appellant's arguments if they were presented with a little less histrionics and a little more substance.